NGO’s Governance Practices Amidst COVID-19

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GOVERNANCE & NGO’S OBLIGATIONS
Governance

To direct and manage an organisation

• Meetings of the Directors / Council / Executive Committee / other operational meetings

Matters beyond the normal operation of an organisation

• Meetings of the Shareholders / Members
NGO’s obligations and liabilities

You should check:

• Constitutional document (i.e. the Articles of Association / the Constitution) – tailored for your organisation

• Companies Ordinance (“CO”) / specific legislation
  – for organisation established under the CO such as companies limited by guarantee (“LBGs”)

• Special terms regarding meetings in any conditions of grants
Points to note when holding a meeting

- Frequency & timing requirement
- Notice period
- Quorum
- Proxy
- Postponement and Adjournment
- Place & technology
Operational meetings

Members / shareholders meetings

• Must hold an AGM in respect of each financial year of the company

• Timing for LBGs – within 9 months after the end of its accounting reference period
  
  (s. 610(1)(a) of CO)

  – or, if it is the 1st accounting reference period which is longer than 12 months – the later of (i) 9 months after the first anniversary of incorporation, or (ii) 3 months after the end of the accounting reference period (ss. 610(1)(a) and 610(2)(a) of CO)

• If contravened,

  – the company and every responsible person commit an offence and each is liable to a level 5 fine (HK$50,000) (s. 610(9) of CO)

  – the Court may call / direct the calling of the meeting & give ancillary directions (s. 610(7) of CO)
Companies Ordinance (Cap. 622)

Notice Period

Operational meetings

Members / shareholders meetings

• AGM – at least 21 days

• Other general meetings – at least 14 days

• Special notice – at least 28 days (s. 578 of CO)
  – Change of auditors (s. 400(1) of CO)
  – Removal of directors (s. 462(4) of CO)
Operational meetings

Members / shareholders meetings

- 2 members present in person or by proxy (subject to Articles & below) (s. 585(3) of CO)

- Except: if the company only has 1 member – then that member present in person or by proxy or by corporate representative is quorum for general meeting (ss. 585(1) and 585(2) of CO)
Operational meetings

- Alternate directors (no power to delegate unless authorised by the articles of association / such power included in the term of appointment)

- Original director vicariously liable for acts of the alternate director while acting in his capacity of alternate director (s. 478(1)(b) of CO)

Members / shareholders meetings

- Some LBGs may require that a proxy must be a member of the same company – if so, then may only appoint a fellow member as proxy (s. 596(2) of CO)

- Need to state such right to appoint proxy in the notice of meeting (s. 597(1) of CO)
  - If contravened, company and every responsible person commit and offence level 3 fine but validity of meeting not affected
Companies Ordinance (Cap. 622)

Postponement and Adjournment

Postponement

• ≠ Adjournment
  – Postponement – deferring the meeting to a later date before the meeting is held
  – Adjournment – extending or continuing a meeting which has been held

• No right to postpone general meeting unless provided in the constitutional document – once a meeting is properly convened, can’t postpone/cancel by subsequent notice
  – Hold the meeting and, with consent of the majority of those present and voting, formally adjourn

• Note timing requirement and notice requirement
Adjournment

- Lack of quorum, disorder, poll taking, or with consent of the meeting
- Resolution passed at an adjourned meeting is regarded as having been passed on the date on which it was in fact passed (i.e. the adjourned meeting but not the original meeting) (s. 587 of CO)
- Fresh notice as required under the constitutions, otherwise not required but is good for corporate governance
Companies Ordinance (Cap. 622)

Place & technology

- Operational meetings
- Members / shareholders meetings
Companies Ordinance (Cap. 622)

Place & technology

**Hong Kong**  
s. 584 of CO

- A company **may** hold a general meeting at **2 or more places** using any technology that enables the members of the company who are not together at the same place to listen, speak and vote at the meeting.

**United Kingdom**  
s. 360A of Companies Act 2006

- Nothing in this Part is to be taken to **preclude** the holding and conducting of a meeting in **such a way** that persons who are not present together at the same place may by electronic means attend and speak and vote at it.
Companies Ordinance (Cap. 622)

Place & technology

Hong Kong

s. 576(1)(b) of CO)

- A company must ensure that a notice of a general meeting ... specifies the place of the meeting (and if the meeting is to be held in 2 or more places, the principal place of the meeting and the other place or places of the meeting)
  * No suggestion that a “place” could mean a purely online platform

United Kingdom

s. 311 of Companies Act 2006

- Notice of a general meeting of a company must state... the place of the meeting
- Notice of a general meeting of a traded company must also include, ...where the company offers the facility for members to vote in advance or by electronic means, a statement of the procedure for doing so (including the date by which it must be done, and details of any forms to be used)
Companies Ordinance (Cap. 622)

**Place & technology**

- UK – first virtual meeting Jimmy Choo Plc 2016 (listed in the UK at that time)
- HK – no record of virtual meeting found
- HK hybrid AGM in 2019 & 2020 - CLP Holdings (incorporated & listed in HK)
  - Specific provision in its Articles of Association for participation via electronic means
  - Broadcasted live online in addition to traditional physical attendance
  - Registered shareholders – option to attend online with right to vote & subject questions online
  - Non-registered shareholders may join as observers – can’t vote online but may submit questions online (*use proxy to vote*)
Companies Ordinance (Cap. 622)

Place & technology

Pitfalls and concerns
- Fair right of participation
- Fair right of speech
- IT failure
- Orderly meeting
Companies Ordinance (Cap. 622)

**Enforcement & responsible person**

- The Registrar of Companies is responsible for enforcing the CO and has authority to prosecute cases of non-compliance
  - 4,867 summonses issued in 2019; 3,066 in 2018

**Responsible person**

- An officer (director, manager or company secretary) or shadow director; and authorises or permits, or participates in, the contravention or failure to comply with a requirement under CO (s. 3(2) of CO)

- An officer or shadow director of a *body corporate* that is an officer or shadow director and that body corporate authorises or permits, or participates in, the contravention or failure to comply (s. 3(3) of CO)
IMPACT OF COVID-19
Impact of the COVID-19

- Social distance encouraged
- Banning group gatherings of more than 4 people in public place
What the others have been doing on social distancing since before 29 March

- Submission of written Qs
- Proxy / online voting
- Teleconferencing, Skype, Zoom, WebEx...
- Compulsory body temperature check
- Refusing access by returnees who have travelled internationally in the past 14 days
- Attendees to wear surgical face masks
- No refreshments or souvenirs
- Limit the number of non-member attendees
- Give reasonable notice and keep the members informed
What the others have been doing on social distancing since before 29 March

PRECAUTIONARY MEASURES FOR THE ANNUAL GENERAL MEETING

Please see page 1 of this document for measures being taken to try to prevent and control the spread of the Coronavirus at the Annual General Meeting, including:

- compulsory temperature checks and health declarations
- recommended wearing of surgical face masks
- no distribution of corporate gifts and refreshments

Any person who does not comply with the precautionary measures may be denied entry into the AGM venue. The Company encourages attendees to wear face masks and reminds Shareholders that they may appoint the Chairman of the meeting as their proxy to vote on the relevant resolutions at the AGM as an alternative to attending the AGM in person.

10 March 2020

PRECAUTIONARY MEASURES FOR THE ANNUAL GENERAL MEETING

In view of the ongoing Novel Coronavirus (COVID-19) epidemic and recent requirements for prevention and control of its spread, the Company will implement the following preventive measures at the Annual General Meeting to protect attending Shareholders, staff and other stakeholders from the risk of infection:

(i) Compulsory body temperature checks will be conducted on every Shareholder, proxy and other attendee at the entrance of the AGM venue. Any person with a body temperature of over 37.4 degrees Celsius may be denied entry into the AGM venue or be required to leave the AGM venue.

(ii) All Shareholders, proxies and other attendees are required to complete and submit at the entrance of the AGM venue a declaration form confirming their names and contact details, and confirming that they have not travelled to, or to their best of knowledge had physical contact with any person who has recently travelled to, any affected countries or areas outside of Hong Kong (as per guidelines issued by the Hong Kong government at www.chp.gov.hk/en/features/102742.html) at any time in the preceding 14 days. Any person who does not comply with this requirement may be denied entry into the AGM venue or be required to leave the AGM venue.

(iii) The Company encourages attendees to wear surgical face masks inside the AGM venue at all times, and to maintain a safe distance between seats.

(iv) No refreshments will be served, and there will be no corporate gifts.
To the extent permitted under law, the Company reserves the right to deny entry into the AGM venue or require any person to leave the AGM venue in order to ensure the safety of the attendees at the AGM.

In the interest of all stakeholders’ health and safety and consistent with recent COVID-19 guidelines for prevention and control, the Company reminds all Shareholders that physical attendance in person at the Annual General Meeting is not necessary for the purpose of exercising voting rights. As an alternative, by using proxy forms with voting instructions inserted, Shareholders may appoint the Chairman of the Annual General Meeting as their proxy to vote on the relevant resolutions at the AGM instead of attending the AGM in person.

The proxy form is attached to the AGM Circular for Shareholders who opt to receive physical circulars. Alternatively, the proxy form can be downloaded from the “Investors” section of the Company’s website at www.pacificbasin.com/en/ir/news.php?cat=circulars&year=2020. If you are not a registered Shareholder (if your Shares are held via banks, brokers, custodians or the Hong Kong Securities Clearing Company Limited), you should consult directly with your banks or brokers or custodians (as the case may be) to assist you in the appointment of proxy.

If Shareholders choosing not to attend the AGM in person have any questions about the relevant resolutions, or about the Company or any matters for communication with the Board, they are welcome to contact the Company via Pacific Basin’s investor relations department as follows:
Isn’t it illegal to gather now?

Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap. 599G) 《預防及控制疾病 (禁止羣組聚集) 規例》

• No group gathering may take place in any public place during a specified period
  – 14-day period specified by the Secretary for Food and Health
  – 29 March 2020 – 11 April 2020
  – 10 April 2020 – 23 April 2020 (so keep abreast of the latest info!)

• Public place (公眾地方) means a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or otherwise (s. 2 of Cap. 599G)
Isn’t it illegal to gather now?

• Criminal offence (s. 6(1) of Cap. 599G):
  – to participate in the gathering
  – to organize the gathering
  – to own, control, or operate the place where the gathering takes place and knowingly allow the taking place of the gathering

• If contravened
  – Level 4 fine (HK$25,000) and imprisonment for 6 months on conviction (s. 6(2) of Cap. 599G)
  – Offenders may discharge liability by paying a fixed penalty of HK$2,000 (s. 8 of Cap. 599G)
  – If fixed penalty paid within 21 days, offender not liable to be prosecuted or convicted (s. 3 of Sch 2 to Cap. 599G)
If group gatherings are banned, how can we hold meetings?

• Exempted group gatherings:
  
  – “Group gathering at a place of work for the purposes of work”
    “在工作地點為工作而進行的群組聚集”

  – Group gathering at a meeting of a body that must be held within a specified period in order to comply with any Ordinance or other regulatory instrument that governs the operation of the body or its business
    “某團體的會議上的羣組聚集，前提是該會議須在指明期間內舉行，以遵守任何條例或符合規管該團體的運作或事務的其他規管性質文書”

Board meeting ✔️

Annual general meeting ✔️

Special / extraordinary general meeting
【禁聚法效应】股東會延期需開會決定 阿里健康：請不要出席

香港政府一再決定不封關，最終受疫情影響仍實施包括禁止在公開場所四人以上的聚集，限制食肆客人數量等防疫措施，為期14日，明日將是「禁聚法」第一日生效的工作日，理論上股東會亦要為此讓路，但似乎上市公司處理方法各有不同。

阿里健康（0241）、長盈（0689）及財訊傳媒（0205）先後宣佈押後明天召開的股東會。由於股東會延期本身按例亦需舉行股東會決議，結果上述3間上市公司明日依然要召開股東會，由主席提呈，將股東會延期至適當日期及時間。

不過由於「禁聚法」限制聚會人數，阿里明確表示，延期是以股東的健康和安全及對該規例的遵從為最重要的考慮，明天股東會除延期議案外，不會討論其他事項，所以建議股東不要親身出席，並明言如果股東打算親身出席，有機會不被獲准進入會議場地。

不過在「禁聚法」下亦有「勇者」，世紀娛樂國際（0959）、建溢集團（0638）及瑞港建設（6816）就決定如期在明日舉行股東大會。建溢明言出席者均須接受強制體溫檢查，體溫高於攝氏37.3度均不得進入會議室，並一定要在股東特別大會的期間佩戴適當的口罩，以及將不會提供茶點，以免與會者緊密接觸。瑞港公告則指，大會主席會確保股東會不會違反包括「禁聚法」在內的香港法例，否則可能即時休會。
Can we...?

• Not hold an AGM this year?
  – Written resolution / dispensation

• Disallow our members from raising questions?
  – Members’ right to speak and be heard
  – Key is to treat the members the same

• Limit the number of attendees?
  – Right of audience
  – Benefit of members as a whole
  – Ensuring orderly meeting
Written resolution in lieu of physical AGM

Not required to hold AGM if:

- Everything that is required or intended to be done at the meeting is done by a written resolution; **and**

- a copy of each of the documents required to be laid/produced at the meeting is provided to each member on or before the circulation date of the written resolution (s. 612(1) of CO)
Dispensation with AGM

Section 613 of the CO

• **How?** Written resolution / resolution passed at a general meeting

• **What?** Resolution passed by all members of the company who are entitled to vote on the resolution on the date of the resolution / circulation date of the proposed written resolution

• **When?** Before the specified period for holding AGM has expired

• **Effect?** Dispensation in force unless a member, by notice (hard copy or electronic form) required an AGM to be held in a particular year or until the dispensation was revoked by passing an ordinary resolution to that effect.

• **That’s it...?**
Dispensation with AGM

Don’t forget...

• **Registration** of the resolution dispensing with AGM – deliver a copy to the Companies Registry within 15 days after it is passed (ss. 622(1)(g) and 622(2) of CO)
  – If contravened, the company and every responsible person commit an offence
    • level 3 fine (HK$10,000)
    • for continuing offence, further fine of HK$300 for each day during which the offence continues

• **Annex** the resolution to every copy of the Articles issues after the passing of the resolution (s. 622(3) of CO)
  – If contravened, the company and every responsible person commit an offence and each is liable to a level 3 fine (HK$10,000)
Dispensation with AGM

Don’t forget...

- **Financial statements, reports** etc. originally required to be laid before an AGM must still be sent to the members within 9 months after the end of the accounting reference period (ss. 430(3) and 431(a)(i) of CO)
  - or, if it is the 1st accounting reference period and longer than 12 months – the **later** of (i) 9 months after the first anniversary of incorporation, or (ii) 3 months after the end of the accounting reference period (ss. 431(1)(a)(ii) and 431(4) of CO)

- If contravened, the company & every responsible person commits an offence (s. 430 of CO)
  - If AGM required – level 5 fine (HK$50,000)
  - If no AGM – fine of HK$300,000
  - If no AGM & wilful contravention – fine of HK$300,000 and 12 months imprisonment
Dispensation with AGM

Don’t forget...

- **Annual return** must still be submitted – within 42 days after the company’s return date (i.e. 9 months after end of accounting reference period for LBGs) (ss. 662(3) and 662(4)(b) of CO)

- If contravened, the company & every responsible person commits an offence
  - liable to a level 5 fine (HK$50,000)
  - for continuing offence, further fine of HK$1,000 for each day during which the offence continues (s. 662(6) of CO)
  - may be ordered by the magistrate to deliver the annual return within specified period → contravention is a separate offence and another level 5 fine plus HK$1,000 daily fine for continuing offence (ss. 662(7) and 662(8) of CO)
FAQs
Questions

• Is it a must for society, company and statutory body to hold AGM?

• If there is no provision in the existing governance document for virtual AGM, what can an NGO do to meet the compliance requirement, if there is problem in arranging face-to-face meeting?

• Please explain the requirements under the Companies Ordinance for holding and dispensing with an AGM? How does it affect the Companies’ annual return filing if an AGM is not held?

• How can NGOs make use of proxy to meet the quorum requirement for their AGM?

• Is hybrid meeting, i.e. virtual plus physical meeting, allowed for an NGO's general meeting?
Questions

• Usually in the AGM of an NGO, the usual procedures are to accept the audited financial report, to appoint Auditors, and to elect board members (depending on their terms). If an AGM cannot be held as schedule, what can be done to handle the above matters?

• How does the ban on gathering of more than 4 persons in public places affect NGOs’ board meeting and general meetings?

• Can an NGO (especially a company) pass written resolutions without holding meetings?

• If there is no provision in the existing governance documents for virtual board meeting, what can be done to enable an NGO’s board to do so? Can a written resolution be passed via email to authorize the board to meeting virtually?

• With the home isolation and travel bans, some of our Board members may not be able to attend board meetings, would virtual meeting attendance count as quorum for board meeting?
Questions

• Do NGOs need to amend their constitution or articles to allow them to hold virtual AGM?

• If our M&A does not mention about online meeting for AGM, can the hybrid meeting (physical place plus online), as suggested by the HKICS, be used?

• Please provide sample of articles allowing companies limited by guarantee to holding online meetings of Executive Committee and AGM.

• please define the relevant governance documents that needs to be considered in resolving these situations
Questions

如果公司的章程細則(Cap.32時期所擬定)沒有明言可以虛擬會議去開1.董事會及2.週年大會：

A. 《公司條例》及章程細則都沒有明言可以開虛擬開議，又是否可以「與會者同意使用虛擬會議」來確立其合規性？例如以(1).在開會前的通知/信函/電子訊息等來確認與會者的同意；或(2)在該虛擬會議一開始時以議案的形式去確立該虛擬會議的合規性？

B. 假若該次虛擬會議並未能據任何符合《公司條例》、章程細則或其他可行的「補救方法」下舉行了．公司(法人本身)、董事、公司秘書、公司的高級職員等是否犯了「刑事罪行」？又或會有甚麼「民事訴訟的風險」(如對公司成員的責任等)？

C. 承上，如果真的有犯下刑事或民事的罪行，又分別會由甚麼人來提出訴訟？(公司註冊處？成員？商業犯罪調查科？)

D. 承上，如果沒有人(包括監管當局、公司成員、市民大眾等)提出訴訟，又是否沒有「問題」或「不良後果」？

E. 承上，假若有人提告，並敗訴，那對公司(法人本身)、董事、公司秘書、公司的高級職員等，各有甚麼罰則？又會否「留案底」？或如有「民事訴訟」，有甚麼賠償責任？
Common issues with NGO’s constitutions

- Does not cater for hybrid meetings / electronic communication during general meetings
- Does not provide that directors may participate in board meetings otherwise than by way of physical attendance
- Does not stipulate how directors and members may pass written resolutions
- Does not elaborate on proxy arrangement
- Does not cater for voting by poll
- State that meeting shall be held at a place (instead of places)
SAMPLE PROVISIONS
Sample article – Enabling hybrid general meetings

65. The Board may, at its absolute discretion, arrange for persons entitled to attend a General Meeting to do so by simultaneous attendance and participation by using electronic means at such location or locations determined by the Board, provided that at least one location shall be in Hong Kong which shall be the principal meeting place for the General Meeting. The following provisions shall apply to any such arrangement:

(i) The members present or by proxy at the meeting venue(s) shall be counted in the quorum for and entitled to vote at the meeting in question, and that meeting shall be duly constituted and its proceedings valid provided that the Chairman of the meeting is satisfied that adequate facilities are available throughout the meeting to ensure that members attending at all the meeting locations are able to participate in the business for which the meeting has been convened.

(ii) The Chairman of the meeting shall be present at, and the meeting shall be deemed to take place at, the principal meeting place.

(iii) If members present at more than one location attend a General Meeting, a failure (for any reason) of communication equipment, or any other failure in the arrangements for enabling those in a location other than the principal meeting place to participate in the business for which the meeting has been convened, shall not affect the validity of the meeting at the principal meeting place, or any business conducted there or any action taken pursuant to such business.

(iv) If any of the meeting locations is outside Hong Kong, the provisions of these Articles concerning the service and giving of notice for the meeting, and the time for lodging proxies, shall be applied by reference to the principal meeting place in Hong Kong.
Sample article – Flexibility in general meetings

40. **Attendance and speaking at general meetings**

(1) A person is able to exercise the right to speak at a general meeting when the person is in a position to communicate to all those attending the meeting, during the meeting, any information or opinions that the person has on the business of the meeting.

(2) A person is able to exercise the right to vote at a general meeting when—

   (a) the person is able to vote, during the meeting, on resolutions put to the vote at the meeting; and

   (b) the person’s vote can be taken into account in determining whether or not those resolutions are passed at the same time as the votes of all the other persons attending the meeting.

(3) The directors may make whatever arrangements they consider appropriate to enable those attending a general meeting to exercise their rights to speak or vote at it.

(4) In determining attendance at a general meeting, it is immaterial whether any two (2) or more members attending it are in the same place as each other.

(5) Two (2) or more persons who are not in the same place as each other attend a general meeting if their circumstances are such that if they have rights to speak and vote at the meeting, they are able to exercise them.
**Participation in Executive Committee Members’ meetings**

36. Subject to these articles, Executive Committee Members participate in an Executive Committee Members’ meeting, or part of an Executive Committee Members’ meeting, when-

   a) the meeting has been called and takes place in accordance with these articles; and
   
   b) they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.

37. In determining whether Executive Committee Members are participating in an Executive Committee Members’ meeting, it is irrelevant where an Executive Committee Member is and how they communicate with each other. Executive Committee meetings can be held using any technology.

38. If all the Executive Committee Members participating in an Executive Committee Members’ meeting are not in the same place, they may regard the meeting as taking place wherever any one of them is. The meeting can be held by electronic means of this arrangement is mentioned in the notice.
56. **Written resolutions**

Subject to the Ordinance, a resolution in writing signed by or on behalf of all the members of the Association or of any class thereof (as the case may be) shall be as valid and effective as if it had been passed as an ordinary or special resolution (as the case may be) at a general meeting of the Company or of the relevant class of members (as the case may be) duly called and constituted. Such a resolution may consist of one or more documents in like form signed by one or more members and shall not be invalidated by failure of the company secretary to certify the wording of the same prior to signature. A written message sent by a member shall be deemed to be a document signed by him for the purposes of this article.
執行委員會的議事程序

40. 畫面的決議由當時的執行委員會所有成員，或經由當時有資格收取
執行委員會或附屬委員會（視乎情況而定）會議通知的附屬委員會成
員確認後，即為有效和具有作用。其效用等同於執行委員會或附屬委
員會曾正式召開和組織會議，並予以通過。
Sample article – Directors’ resolutions

Unanimous decisions

29. A decision of the Executive Committee Members is taken in accordance with this article when all eligible Executive Committee Members indicate to each other (either directly or indirectly) by any means that they share a common view on a matter.

30. (a) Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible Executive Committee Member or to which each eligible Executive Committee Member has otherwise indicated agreement in writing.

(b) A resolution in writing mentioned in article 31(a) may be executed in any number of counterparts and by different parties on separate counterparts, each of which should be the same resolutions.

31. A reference in this article to eligible Executive Committee Members is a reference to Executive Committee Members who would have been entitled to vote on the matter if it had been proposed as a resolution at an Executive Committee Members’ meeting.

32. A decision may not be taken in accordance with this article if the eligible Executive Committee Members would not have formed a quorum at an Executive Committee Members’ meeting.
Q&A
Stay home, stay safe!

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